UNPUBLISHED--**DO NOT PUBLISH**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-3960
NON-Argument Calendar
D. C. Docket No. 89-522-CIV-Orl-19

JOHNNIE WALKER,

Plaintiff-Counterdefendant-Appellant,

versus

FRITO-LAY, INC.,

Defendant-Crossclaim Plaintiff-Appellee.

NO. 91-3287
Non-Argument Calendar
D. C. Docket No. 89-522-Civ-Orl-19

JOHNNIE WALKER,

Plaintiff-Appellant,

versus

FRITO-LAY, INC.,

Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(January 9, 1992)

Before COX and BIRCH, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

The judgment of the district court entered in this case on September 21, 1990, that was based upon the findings of fact and conclusions of law entered in this case on the 20th day of September, 1990, is AFFIRMED.

UNPUBLISHED **JUDGMENT IN A CIVIL CASE**

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
89-522-CIV-ORL-19

Decided Sept. 20, 1990

Johnnie Walker,

Plaintiff

v.

FRITO-LAY, INC.,

Defendant.

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

x **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT Plaintiff's claim under § 1981 is dismissed for failure to state a claim. The Court finds in favor of the Defendant, Frito-Lay, Inc., on the Title VII claim. Adopting the verdict of the advisory jury, the Court rules that the Defendant, Frito-Lay, Inc., prevails on the claim of racial discrimination, and that Plaintiff, Johnnie Walker, prevails on Defendant's claim against him for vacation pay.

Date: September 21, 1990

DAVID L. EDWARDS
Clerk

s/ Bessie S. Lamb
(By) Deputy Clerk

(UNPUBLISHED)

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
89-522-CIV-ORL-19

Johnnie Walker,

Plaintiff,

v.

FRITO-LAY, INC.,

Defendant.

Sept. 20, 1990

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trial of this case commenced September 6, 1990 on Plaintiff's claim of race discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981. Prior to the beginning of the trial, Defendants filed a Motion to Strike Plaintiff's Demand for Jury Trial (Doc. No. 32), and Plaintiff filed his Opposition to that Motion (Doc. No. 36). The Court announced that it would reserve ruling on the Motion

until the conclusion of the trial, and that in the event the Motion to Strike was granted, the jury's verdict would be treated as an advisory verdict.

After hearing the evidence and the argument of counsel, the Court enters its Findings of Fact and Conclusions of Law as follows.

FINDINGS OF FACT

Plaintiff, Johnnie Walker, during his approximately ten years of employment with Defendant, Frito-Lay, Inc., was given several citations for infractions and improper conduct as well as two commendations during the job while he was being supervised by both black and white employees (Plaintiff's Exhibits 7-11, 27, 28, 30, 31; Defendant's Exhibits 23d, g, f, n, s, ab; Plaintiff's Exhibits 34b and c). However, these disciplinary infractions and commendations are not relevant to the issue presented in this case.

On Saturday, September 3, 1988, Labor Day weekend, Walker, who is black, was working the second shift in the packaging department at Frito-

Lay from 2:30 p.m. until midnight. His supervisor that evening, Jessie Robinson, who is also black, was on his way to take care of a problem involving potato chips spilling from an Allen conveyer system when Robinson was approached by his superior, Mr. Paul Youngpeter, second in command under the plant manager. The time was 10:25 p.m., shortly before the second shift was to enjoy an early shut down at 10:30 p.m. that night. Robinson advised Youngpeter that Robinson could not speak to him at that time and Robinson walked over to the three packing machine employees working that evening--Gordon Pratt, Bob Bailey and Plaintiff Walker. Robinson took Bailey with him up to the Allen conveyer on the third level of the plant, leaving Walker and Pratt working at the packing machines. Youngpeter went back to his office to wait until Mr. Robinson became available so that he could speak with him.

At 10:35 p.m., while Youngpeter was sitting in his office, he saw Plaintiff Walker exiting an

east door of the plant which was not to be used by employees unless they were taking trash to a compactor. He saw Plaintiff jog around Defendant's trailers to a parking lot, bend down and look under a white Pontiac Grand Am car, enter this vehicle, and drive it out of the Defendant's parking lot and up a public street to a Circle K. Later he observed Walker return in the Grand Am to the parking lot, park the car in the same parking spot, and jog back to the east side of the building.

Youngpeter immediately went to the time clock which is used by employees to clock in and out of work to check the time on the face of the time clock against his own watch. Both his watch and the time clock registered 10:45 p.m.. Youngpeter then began to look for Plaintiff. Although he observed Gordon Pratt clocking out prior to leaving the plant, he was unable to locate Plaintiff.

Robinson and Youngpeter then checked the time cards. Walker's time card reflected that he had clocked out at 10:43 p.m. (Defendant's Exhibit

4). Pratt's time card reflected that he had clocked out at 10:46 p.m. (Defendant's Exhibit 55). The difference between the clock out time on the time cards of these two employees was approximately three minutes.[1]

Failing to locate Walker in the plant that evening, Defendant's management waited until Plaintiff returned on the next workday, September 6, to question him concerning his actions on Saturday evening.

Plaintiff's version of the facts given at trial was as follows. While he was at the bathroom, a co-employee, Merdis Brown, asked him to take her car and put air in one of her tires. Walker stated that he clocked out of the plant, went out a side door which "everyone uses," got into Ms. Brown's car, and drove it out of the parking lot across the street to the Circle K to an air pump. At the Circle K he found that he did not have a quarter and that the store was closed. Although he saw that the 7-Eleven across the street was open, he returned to

Frito-Lay without obtaining air in the tire, parked Ms. Brown's car in the same parking spot, and jogged back to the east door where he reentered the plant because he had forgotten his tool box and because he wanted to compute the time on his time card so that he could keep a record of the hours he had worked. When he reentered the plant, he saw Bailey and Pratt. He then left the plant, proceeded in his car to Ms. Brown's car to leave her keys under her car seat, and drove to his home several miles away in an area known as Rosemont, arriving there before 11:00 p.m..

There is no dispute in the evidence that Plaintiff did not have permission to leave the plant without clocking out and that Plaintiff knew that leaving the plant without clocking out was a violation of company rules which could result in termination. The evidence reflects that it would take approximately seven minutes to leave the plant, take a car to the Circle K, and return to the plant in the manner described by Plaintiff.

Plaintiff was advised on September 6, 1988 that his case would be investigated, and on September 8, 1988 he was terminated for violating the plant work rules prohibiting leaving the plant during working hours without clocking out and falsification of time cards (Defendant's Exhibit 9).

Plaintiff prosecuted his case through an internal appeal process at Frito-Lay. After carefully researching the facts of the case, and after listening to Plaintiff's version of the facts at an appeal hearing on September 13, 1988, Mr. Irving Mathews, the plant manager, who is also black, affirmed Plaintiff's termination by letter dated September 26, 1988. (Plaintiff's Exhibit 18b). This decision was affirmed on final appeal (Plaintiff's Exhibit 23 dated November 28, 1988).

Plaintiff's claim to the Equal Employment Opportunity Commission concerning his termination resulted in the issuance of a right-to-sue letter dated April 28, 1989 by which the EEOC notified Mr. Walker that "the evidence obtained du-

ring the [EEOC] investigation does not establish a violation of [Title VII]." Defendant's Exhibit 1).

From the evidence it appears that Plaintiff's position was filled by a white female who was working during Plaintiff's shift and on his same work detail. This lateral move was made during a period in which the company was laying off employees. Plaintiff contends that he was racially discriminated against because in 1984 a white employee, Marc Ann Drake, was cited for leaving the premises before clocking out but was not terminated. Ms. Drake testified that since the time she had been hired in 1969 at Frito-Lay it had been a regular practice to walk across the street on breaks to get food, the orders for which had been placed in advance by telephone.[2] While she was returning from the restaurant, her supervisor advised her that leaving the plant without clocking out was a work rule violation. Ms. Drake testified that at the time she had no idea this was a viola-

tion of a rule. Nevertheless, her employment record reflected that she was cited for this violation. The evidence also reflected that after this incident and before Plaintiff's termination, the company posted a work rule which advised employees that leaving the premises without permission and without first clocking out was a serious infraction which would result in discipline, including termination.[3]

As noted above, and in contrast to the situation described by Ms. Marc Ann Drake, Plaintiff admits that he knew before leaving the plant premises that departures of an employee without first clocking out is an offense for which termination can be imposed. Plaintiff contends that he did clock out before he left the premises to take Ms. Brown's car to the Circle K and that he returned to the plant only to get his tools and to count up his hours. The Court finds that Plaintiff's version of the facts is not credible.[4]

Plaintiff's testimony at trial and previous statements contained inconsistencies which are worthy of note. On direct examination during trial, Plaintiff testified that when he finally left the premises on the evening of September 3, 1988, he departed through a side door. When questioned by his supervisors near the time of the event, Walker testified that he departed from the front door of the plant on September 3rd. Further, at trial Walker testified that he was fired for falsifying his time card, leaving the premises without first clocking out, and for intoxication. Later during cross-examination he admitted that nothing about intoxication had been said to him or placed in his letter of termination. During his deposition testimony, Walker testifed that he put his tool box in his care before going to the car of Ms. Brown and driving her car to the Circle K. At trial he testified that he returned to the plant to get his tool box as well as to check his time card to calculate the hours he had worked. In addition to the above,

at the meeting held on September 13, 1988, on Plaintiff's appeal, Plaintiff contended that Mr. Youngpeter had not seen Plaintiff do what Youngpeter stated he had seen. Finally, during deposition testimony, Walker testified that he had clocked out before he had seen Ms. Brown and she had made her request to him.

More importantly, it would not be possible for Plaintiff to perform the errand for Ms. Brown as he and Mr. Youngpeter described its performance between 10:43 p.m., the time on his time card, and 10:45 p.m., the time when Mr. Youngpeter looked at the official time clock after he saw plaintiff return to the plant. It would be impossible for him to perform this errand between the time he clocked out (10:43 p.m.) and the time that Mr. Pratt clocked out (10:46 p.m.). Further, Walker could not clock out at 10:43 p.m., do the errand he described for Ms. Brown, return to the plant, and then drive home in time to arrive there by 10:55 p.m. as he stated to his supervisor.

Plaintiff's version of the facts is also not credible from circumstantial evidence. If plaintiff had clocked out before he ran the errand, as he testified, it would have been more logical for him to exit from the front door of the plant because the employee time clock is located closer to the front door, which was the door used by employees to enter and exit the premises, and the front door is closer to where Ms. Brown's car was parked. The east door which Plaintiff used was not to be used by employees except under certain circumstances[5] and was farther away from the time clock and Ms. Brown's car than the front door. From the evidence it appears that Plaintiff decided to take advantage of his supervisor's absence on the third level of the plant to leave the premises without permission, run an errand, and return to the plant before he clocked out.

Defendant's managerial employees thoroughly and carefully researched the case before termi-

noting Plaintiff. The evidence supports the conclusion of Defendant's managerial employees that Plaintiff willfully, knowingly, and deliberately violated a work rule and then lied to conceal his actions when he was caught. His actions constitute falsification of his time card and leaving the work premises prior to clocking out.

CONCLUSIONS OF LAW

Motion to Strike Plaintiff's Demand for Jury Trial

In this Circuit, there is no right to a jury trial for claims under Title VII. Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1529 n. 4. (11th Cir. 1990); Wilson v. City of Aliceville, 779 F.2d 631, 635 (11th Cir. 1986).

Furthermore, while there is a right to a jury trial on the legal issues in a § 1981 claim, the Court finds, as discussed below, that Plaintiff's § 1981 claim fails as a matter of law in the wake of Patterson v McLean Credit Union, 109 S.Ct. 1363 (1989).

For these reasons, the Court GRANTS Defendants' Motion to strike Plaintiff's Demand for Jury Trial (Doc. No. 32). The verdict of the jury is treated by the Court as advisory.[6]

Section 1981 Claim

On the basis of the Supreme Court's recent decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), the Court finds that Plaintiff is unable to state a claim under § 1981. In Patterson, the Supreme Court held that an employee's claim of racial harassment by an employer is not actionable under § 1981 because § 1981 is limited, in the employment discrimination context, to forbidding discrimination in the making and enforcement of contracts. Section 1981 "covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." Patterson, supra, at 2374.[7]

While the Supreme Court has not directly stated that a claim of discriminatory discharge would also fall outside the scope of § 1981[6], the Fifth, Seventh and Ninth Circuits, as well as many district courts, have so held. Reeves v. MCI Telecommunications Corporation, 909 F.2d 144 (5th Cir. 1990); Lavender v. V & B Transmission and Auto Repair, 897 F.2d 805 (5th Cir. 1990); McKnight v. General Motors Corporation, 908 F.2d 104 (7th Cir. 1990); Courtney v. Canyon Television & Appliance Rental, Inc., 899 F.2d 845, 849 (9th Cir. 1990); Coleman v. Domino's Pizza, Inc., 728 F. Supp. 1528, 1531-32 n. 3 (S.D. Ala. 1990). The Eighth Circuit disagrees with this view and has held that a claim of racially discriminatory discharge continues to be actionable under § 1981. Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990). The Second Circuit recently indicated that a discriminatory discharge suit under § 1981 can survive after Patterson only if the plaintiff prop-

erly alleges that the defendant entered into the employment contract with the intent to later terminate the contract on the basis of race. Gonzalez v. The Home Insurance Company, 909 F.2d 716 (2d Cir. 1990). The Eleventh Circuit has not addressed this precise question. It has held, however, that § 1981 does not provide a remedy for an employee who is injured by his former employer's efforts to persuade his new employer to fire him in retaliation for the employee's filing an EEOC complaint against the former employer. Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir. 1990).

Although the Defendant in Sherman was not accused of discriminatory discharge, the Eleventh Circuit recognized in that case that the Patterson decision "significantly narrowed the reach of [§ 1981] in the context of employment discrimination suits." Id. at 1534. The Sherman Court interpreted the Patterson decision as holding that "suits based on post-contractual events cannot be brought

under section 1981." Id. Thus, it seems likely that the Eleventh Circuit would adopt the majority view that, in light of Patterson, a discriminatory discharge claim is not actionable under § 1981, at least where, as in this case, there is no reasonable way to construe the discharge as a refusal to enter into a new contract with the plaintiff.

This Court rules, therefore, that Plaintiff's § 1981 claim fails as a matter of law. However, because this question has not been squarely addressed by the Eleventh Circuit, it is possible that the Court of Appeals may determine, as did the Eighth Circuit, that a claim for discriminatory discharge may still be brought under § 1981.[9] It was primarily for this reason that the Court deemed it prudent to allow the § 1981 claim to be considered by an advisory jury so as to avoid the necessity for a new trial should this Court's legal ruling be reversed on appeal.

Title VII Claim

Plaintiff sought to prove a case of disparate treatment.[10] He conceded that he did not have direct proof of discrimination. In such circumstances, a plaintiff has the initial burden of establishing a prima facie case. If the plaintiff establishes a prima facie case, the burden of production shifts to the defendant. The plaintiff retains, however, the ultimate burden of proving discriminatory intent on the part of the defendant, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

Mr. Walker is a member of a protected minority, he was qualified for the position which he held, he was terminated from that position for a violation of a time clock rule whereas a white employee had previously been cited for the same violation but had not been terminated, and his position appears to have been filled by a white female. Thus, the Court finds that Plaintiff met his

initial burden of establishing a prima facie case by a preponderance of the evidence. See Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1185 (11th Cir. 1984). See generally McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Because Plaintiff made out a prima facie case of discriminatory discharge, the burden shifted to Defendant to articulate a legitimate, nondiscriminatory reason for its action. Defendant met this burden by putting forward specific, credible evidence to indicate that Plaintiff was indeed terminated for violation of the time clock rule.

Defendant having introduced evidence of a legitimate, nondiscriminatory reason for its action, the Court next considers whether Plaintiff proved that Defendant's proffered reason was merely a pretext for discrimination. The Court finds that Plaintiff did not meet this ultimate burden.

After carefully considering all the evidence in the case, the Court finds that Plaintiff did not

establish that discriminatory intent more likely than not motivated the termination of Plaintiff or that Defendant's proferred reason for the termination is unworthy of belief. The decision to terminate Plaintiff was not a hasty action, but, rather, a considered decision made by Plaintiff's supervisors after careful investigation of the facts. Termination for violation of the time clock rule is not a departure from Frito-Lay's normal business practice. Ms. Drake, the white employee who was cited but not terminated by Defendant for violation of the same rule several years previously, claimed that she did not know about the rule at the time of her violation, and it is undisputed that subsequent to Ms. Drake's citation, the company publicly posted the work rule announcing that leaving the premises without permission before clocking out is a serious infraction which could result in termination.[11] Indeed, Plaintiff admits that he was aware he could be terminated for violating the

time clock rule. Plaintiff's contention, in essence, is that his version of the facts was disbelieved for racially discriminatory reasons. The Court finds this contention contrary to the evidence.

Conclusion

Plaintiff's claim under § 1981 is dismissed for failure to state a claim. The Court finds in favor of Defendant on the Title VII-claim. Adopting the verdict of the advisory jury, the Court rules that Defendant prevails on the claim of racial discrimination, and that Plaintiff prevails on Defendant's claim against him for vacation pay. The Clerk is directed to enter judgment accordingly.

DONE AND ORDERED at Orlando, Florida, this 20th day of September, 1990.

Patricia C. Fawsett
Patricia C. Fawsett
United States District Judge

Footnotes

1--The Frito-Lay, Inc. time clock is based on one hundred increments in an hour and therefore the clock-out time is rounded off in this opinion to the best advantage of the Plaintiff.

2--Ms. Drake was eventually terminated by Mr. Mathews shortly before he terminated Plaintiff because Ms. Drake had been sleeping on the job. She testified that she felt her termination was appropriate.

3--The plant manager, Mr. Mathews, testified that the reasons for this work rule were (1) to insure that employees were properly paid for time worked and (2) to protect the company from liability if employees were off the premises without having first clocked out.

4--Although Adele Fitzgerald testified that from time to time there was a difference between the time on the time clock and the time on clocks placed at various locations around the plant, there is no evidence that there was any malfunction or incorrect time on the official clock used by employees to record their arrival and departure at work on September 3, the date in question. Further, as noted above, the time clock also had a

4 (cont.)--clock on its face which accurately reflected the time being clocked on the time cards of the employees. Therefore, the Court finds that the time on the time cards of Mr. Walker and Mr. Pratt on the evening of Sept. 3, 1988 are correct.

5--There is no evidence that Plaintiff was carrying trash to the compactor, the only use allowed for this door. Plaintiff testified affirmatively that he did not take out his trash.

6--At the commencement of trial, the Court informed the parties that it probably would rule as a matter of law that the § 1981 claim fails and that the jury would be an advisory one. The Court elected to convene an advisory jury in this case as the effect of Patterson on discriminatory discharge suits has not been definitely stated by the Eleventh Circuit, as discussed later in this opinion.

7--§ 1981 provides: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

8--The Supreme Court, apparently, considers this to be an open question. See Lytle v. Household Manufacturing, Inc., 110 S. Ct. 1331, 1336, n. 3 (1990); Id., at 1339 (O'Connor, J., concurring); Jett v. Dallas Independent School District, 109 S. Ct. 2701, 2710 (1989).

9--Another District Court within this Circuit has so ruled. Kriegel v. Home Ins. Co., 739 F. Supp. 1538 (N.D. Ga. 1990). But see Coleman v. Domino's Pizza, Inc., 728 F. Supp. 1528, 1531-32 no 3. (S.D. Ala. 1990); Debailey v. Lynch-Davidson Motors, Inc., 734 F. Supp. 974, 976 n. 2 (M.D. Fla. 1990).

10--There has been no evidence of a facially neutral employment practice having a discriminatory impact.

11--This work rule was posted in 1985. Thereafter, a black female was fired in 1985. Plaintiff, a black male, was fired in 1988, and three whites (two males and one female were terminated for violating this rule in 1989).

UNPUBLISHED ENDORSEMENT ON ONE PAGE MOTION

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

89-522-CIV-ORL-19

Johnnie Walker,

Plaintiff,

v.

FRITO-LAY, INC.,

Defendant.

Motion Filed Sept. 28, 1989
Motion Denied Oct. 17, 1989

PLAINTIFF'S MOTION FOR DISQUALIFICATION OF FEDERAL JUDGES RESIDENT IN ORLANDO

COMES NOW Plaintiff on the basis of his affidavit and that of his attorney and moves for the recusal of resident judges pursuant to 28 U.S.C. § 144. Plaintiff, a member of the Committee of Organized Groups ("COG") in 1988-89 bases his request in

pertinent part on the recusal of both of those judges in COG v City of Orlando, 88-962-Civ-Orl-10, late last year. Both did so, because the involvement of his attorney herein in other cases in which they had recused themselves.

WHEREFORE, having no other remedy at law or in equity, Plaintiff asks these judges to proceed no further. Upon recusal, they should have the matter forwarded for reassignment to the chief judge, W. T. Hodges, before a final judgment can be entered in this case.

Gabe Kaimowitz
Gabe Kaimowitz FL Bar #0633836
3173 Whisper Lake, #A, Winter Park, FL 32792 (407) 678-3713, Attorney for Plaintiff

(JUDICIAL DENIAL OF MOTION)

This Motion is insufficient as a matter of law and is denied. 10-17-89. Judge Patricia C. Fawsett

UNPUBLISHED ENDORSEMENT ON ONE PAGE MOTION

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

89-522-CIV-ORL-19

Johnnie Walker,

Plaintiff,

v.

FRITO-LAY, INC.,

Defendant.

Motion Filed Sept. 20, 1990
Motion Denied Oct. 2, 1990

PLAINTIFF'S MOTION FOR RECONSIDERATION OF RECUSAL

COMES NOW Plaintiff, by his attorney, and moves the Hon. Patricia C. Fawsett to reconsider her refusal to recuse herself, because of bias against him and his counsel evidenced by and through extrajudicial statements presented with an original motion for recusal, and herewith.

Such reconsideration is sought pursuant to Rule 60(b), F.R.Civ.P. Plaintiff, by his attorney, reserved the right to make this motion prior to the start of the trial in this matter. Plaintiff's attorney reiterated his desire for reconsideration of recusal, when, at the direction of Defendant's counsel, Judge Fawsett stopped questioning of a witness, and later barred her and two others from testifying altogether. The judge also excluded certain exhibits, not only for submission to the jury but from her own consideration on an employment discrimination claim based on Title VII of the Civil Rights Act of 1964. In fact, because of the judge's bias, Plaintiff was deprived entirely of a meaningful bench trial of the Title VII claim. See memo of law and affidavit herewith.

WHEREFORE, having no other remedy at law or in equity, Plaintiff seeks recusal of this judge so that a far (sic) may be had by an impartial Court at least on the Title VII claim.

Gabe Kaimowitz

Gabe Kaimowitz FL Bar #0633836
3173 Whisper Lake, #A, Winter Park, FL 32792 (407) 678-3713,
Attorney for Plaintiff

(JUDICIAL DENIAL OF MOTION)

Denied 10-2-90
Judge Patricia C. Fawsett

(UNPUBLISHED)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-3960
NO. 91-3287

D. C. Docket No. 89-522-CIV-Orl-19

JOHNNIE WALKER,
Plaintiff-Counterdefendant-Appellant,

versus

FRITO-LAY, INC.,
Defendant-Crossclaim Plaintiff-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING

BEFORE: COX and BIRCH, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM: THE petition(s) for rehearing filed by the appellant is ***denied*** (STAMPED Feb. 28, 1992)
ENTERED FOR THE COURT by ***Emmett R. Cox***,
United States Circuit Judge

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
89-522-CIV-ORL-19

Johnnie Walker,

Plaintiff

v.

FRITO-LAY, INC.,

Defendant.

DISTRICT COURT DECISION FROM THE BENCH-
TRIAL TRANSCRIPT OF SEPTEMBER 6-7, 1990

Q. (By PLAINTIFF'S ATTORNEY): Mr. Walker, by that time had you filed a discrimination charge against the company? A. Yes, I did.

Q. Had you also applied for unemployment compensation benefits? A. Yes, I did.

Q. Had you been notified by that time by the Unemployment Compensation whether you would receive those benefits?

(DEFENDANT'S ATTORNEY): Objection, Your Honor, on the grounds previously stated in my motion. (A motion to exclude any mention or use of a unemployment compensation appeals decision or transcript made in limine was not resolved until trial.)

THE COURT: I'll sustain the objection...

THE COURT:....You started questioning Mr. Walker about whether he had already filed a claim for discrimination and the claim for unemployment benefits prior to this time. He had one other meeting.

(PLAINTIFF'S ATTORNEY): Right, Your Honor. Your Honor, we understand the decision in the case. The problem for us is as follows, we see no reason that either (written transcript or oral recording on which an unemployment compensation appeal decision was based) would be harmful. One, that the company at that time clearly went on record that one of the charges against Mr. Walker was intoxication. Secondarily, and later indicated in the same proceeding, that it was withdrawn

(the charge of intoxication). Secondarily, and critically for us is the date of the decision. However, not the decision itself, because we want to show that (a Defendant executive hearing Walker's final internal appeal) knew or had known at the time that he decided against Mr. Walker, that, in fact, the company already had lost the appeal with regard to the unemployment compensation. So, I was trying to get in, in some way, and I'm going to do it any agreeable way, simply the time sequence that the company had been apprised by the State of Florida that, in fact, their claim of misconduct had somehow been overruled.

THE COURT: I'll sustain the objection to the decision. It would appear to me that the charges of intoxication then thereafter being withdrawn in a separate administration action by Worker's Compensation (sic) isn't at this point, relevant, but it may be something that you need to bring out on rebuttal depending on the position that's taken by the Defendant.

(UNPUBLISHED)

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY UNEMPLOYMENT COMPENSATION APPEALS BUREAU, ORLANDO, FLORIDA

Docket No. 88-19357U

Nov. 10, 1988, Service by Mail Nov. 14, 1988

NOTICE OF DECISION OF APPEALS REFEREE

JURISDICTION: 443.151 (4)(a) & (b) F.S.

CLAIMANT/APPELLANT	) EMPLOYER
	)
S.S. No. 264-21-1416	) No. -0006846-
JOHNNIE K. WALKER	) FRITO-LAY, INC. &
5020 Rosamond Dr., #2604	) GATES, McDONALD
Orlando, FL #32808	) P.O. Box1944 Co-
	) lumbus, OH 43216

CLAIMANT'S REPRESENTATIVE	EMPLOYER SITE:
GABE KAIMOWITZ	FRITO-LAY, INC.
3173 Whisper Lake, #A	2800 Silver Star
Winter Park, FL 32792	Orlando, FL 32808

Other copies mailed to: UCCO 3632-0

APPEARANCES: Claimant - YES Employer - YES

IMPORTANT: This decision will become final unless within 20 calendar days after the date it is mailed you file an application for review to the Unemployment Appeals Commission, Room 221, Ashley Building, 1321 Executive Center Drive, East, Tallahassee, FL 323899-0681.

ISSUES INVOLVED: SEPARATION: Whether claimant voluntarily left work without good cause; provided that good cause shall include such cause as is attributable to the employing unit or consists of illness or disability of the individual requiring separation; or was discharged for misconduct connected with work, and if appropriate, the number of weeks the claimant is disqualified from receipt of benefits as provided in Sections 443.101 (1) and 443.036(26), Florida Statutes, and Florida Administrative Code Rule 38B-2.17.

CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether the benefit payments made to claimant

shall be charged to the employment record of the employer as provided in Section 443.101(9) and 443.131(3)(a), Florida Statutes, and Florida Administrative Code Rule 38B-2.06.

FINDINGS OF FACT: The claimant became employed on September 5, 1978, as a potatoe (sic) inspector, by employer (-0006846-8), that packages and distributes snack food items. During the course of this employment, the claimant worked as a sanitation helper, processing utility worker and packaging technician. In 1988, the claimant's hours of work were from 3:30 p.m. until midnight. On September 3, 1988, the claimant reported for work at his usual time and as this was a shutdown shift, it would be over before midnight. Around 10:30 p.m. that evening, the claimant stopped operating the packaging machine, as the work was finished and he then proceeded to clean up his area, after which

he headed for the time clock. After punching his time card, he then went out into the parking lot and proceeded over to a white car which belonged to a co-worker, as he had promised her that he would drive it across the street and put air in the tires. The production manager, who was in his office, observed the claimant in the parking lot and driving off. A few moments later, the claimant returned and the production manager watched him go into the packaging department. The production manager then left his office and was on his way to the packaging department when the claimant nodded a greeting to him as they were not close enough to talk. The production manager noticed the claimant stopping at the time card rack and pulling one out. The claimant earlier, when he was at the time clock, overlooked tallying up the number of hours that he had worked in that week and had returned to do so. On September 6, 1988, the claimant was informed that he had been seen

leaving without punching his time card out. The claimant denied that he left the employer's premises without punching out. However, he was informed that he was being suspended pending investigation. On September 8, 1986, the claimant was informed that his services were terminated.

CONCLUSIONS OF LAW: The law provides that an individual who has been discharged for misconduct connected with the work shall be disqualified from receiving benefits. "Misconduct connected with the work" means conduct evincing such willful or wanton disregard of an employing unit's interests as is found in deliberate violation or disregard of standards of behavior which the employing unit has a right to expect of its worker; or carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employing unit's interests or of the worker's duties and obligations to the employ-

ing unit.

The record and evidence in this case clearly show that the claimant was discharged by his employer on September 8, 1988. It is further shown that this discharge occurred because allegedly the claimant left the employer's premises without punching out and by so doing falsified his time card. The claimant in his testimony was adamant that he did not leave the employer's premises without first punching his time card and under such circumstances his action (sic) were not in deliberate disregard of the employer's interest. On the other hand assuming that the employer's contention is correct at most it can be said that it was due to an inadvertence on the claimant's part and in such (sic) an isolated incident of misconduct does not serve to disqualify him from receiving unemployment compensation benefits.

Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inab-

ility or incapacity, inadvertence or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute. Tucker v. Florida Department of Commerce, 366 So.2d 845 (Fla. 1st DCA 1979). It therefore follows that the claimant was discharged but not for misconduct connected with his work within the meaning of the law.

DECISION: The claims adjudicator's determination dated October 7, 1988 is hereby reversed.

A. J. Winewico

A. J. Winewico, Appeals Referee
Orlando, Florida, November 10, 1988

This is to certify that a copy of the above decision was mailed to the last known address of each interested party on November 14, 1988.

By *F. Allison*
Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
Case No. 88-962-CIV-ORL-19

COMMITTEE OF ORGANIZED GROUPS ("COG"), ET AL.,
Plaintiffs,

v.

THE CITY OF ORLANDO, FLORIDA ("CITY"), et al.,
Defendants.

Granting of Recusal, Oct. 31, 1988

ORDER

This cause came before the Court on Plaintiffs' Renewal of Motion for Recusal of Resident Judges (Doc. No. 8, filed October 31, 1988) and Plaintiff's Motion for Recusal October 26, 1988).

In Plaintiffs' Motion for Recusal of Resident Judge (sic), Plaintiffs moves (sic) for recusal; of the undersigned Judge pursuant to 42 U.S.C. § 455 because she had recused or disqualified herself in two other civil actions pending before the Court involving Plaintiff's Attorney, Gabe

Kaimowitz. In Plaintiffs' Renewal Motion of Recusal of Resident Judges, Plaintiffs allege:

"12. Finally, in the second case in which Judge Sharp recused himself involving Kaimowitz, action has been taken by the attorney to disassociate himself from the Florida Bar. Judge Sharp is a member with a fiduciary interest in that outcome. The Middle District of Florida pays particular heed to the views of the Florida Bar. (See notice herewith.)

Hon. Patricia Fawsett

13. Recusal also is sought of the Hon. Patricia Fawsett for the reasons stated in Points #12 an #13 (sic)."

In Plaintiffs' Memorandum of Law in Support of Renewal of Motion for Recusal of Resident Judges and Motion for a TRO (Doc. No. 10, filed October 31, 1988, Plaintiffs assert at page 4:

"While Judge Fawsett is not said to have such a personal bias, her recusal is required here since she has disqualified herself from two pending cases involving her former law partner and Plaintiffs' attorney here. In one, the same City

Defendant herein is involved and in the other The Florida Bar is implicated. Judge Fawsett served as an active member of The Florida Bar until 1985-86 when she was appointed to the federal bench. Need for her disqualification here is obvious if the appearance of justice is to be served, as described in Liljeberg, supra."

While no bias or prejudice of the undersigned Judge actually exists, and Plaintiffs' allegations are insufficient as a matter of fact to require recusal, the undersigned Judge will recuse herself in this matter in order to avoid the appearance of impropriety or partiality.

This case shall be forwarded to the Chief Judge of the United States District Court for the Middle District of Florida for reassignment.

DONE AND ORDERED at Orlando, Florida this 31st day of October, 1988.

Patricia C. Fawsett

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE